

## **Annex 3**

### **Breach of contract, arbitration and other legal provisions**

#### **1. PLCs and share ownership**

*Clause 1.* If the contractor is registered as a public or a limited liability company, HUR will in connection with the contractual negotiations demand to know who the share/stock owners are. The share/stockholding under 10% does not have to be disclosed, unless the stock or shareholder has an otherwise controlling interest in the company.

*Clause 2.* Any changes in the ownership of stocks and shares during the contract period must immediately be disclosed to HUR in writing.

*Clause 3.* If, during the contract period, there are any significant changes in the ownership of stocks, including if the controlling interest is changed, HUR is entitled to terminate the service agreement with 3 months written notice, provided that the notice of termination is executed no more than 1 month after HUR has been made aware of the circumstances justifying such termination.

*Clause 4.* However, HUR is only entitled to terminate the service agreement in accordance with *clause 3* (above) where strong reasons so dictate.

#### **2. Subcontractors**

*Clause 1.* Any deployment of a subcontractor must be approved in advance by HUR. The deployment of subcontractors does not release the contractor from any obligations to HUR.

*Clause 2.* If the contractor wants to complete the service agreement in full or in part by subcontractors, it must be stated which parts of the service agreement are expected to be performed by the individual subcontractors. During the contract negotiations, the contractor will be expected to disclose the names of the subcontractors. Any subcontractors must have authorisation for commercial passenger transportation from the Traffic Council (“Færdselsstyrelsen”)

*Clause 3.* HUR must be notified immediately, in writing, of any significant changes in the mutual distribution of work, including the appointment of other subcontractors.

*Clause 4.* Entrusting the driving to someone else or engaging other subcontractors after the commencement of the contract, must be notified immediately to HUR for approval, before the transfer is put into effect.

*Clause 5.* Where strong reasons so dictate, HUR is entitled to refuse to accept a new subcontractor, or to accept a substantial change in the mutual distribution of work.

### **3. Assignment of entitlement**

The contractor is only entitled to assign his claims to the contract sum to his financial institution.

### **4. Control**

*Clause 1.* HUR is entitled to monitor the contractor’s compliance with the service agreement through inspection of the deployed buses whilst in operation. Such monitoring does not release the contractor from the responsibility of ensuring that the buses satisfy the agreed stipulations.

*Clause 2.* HUR is also entitled to visit the contractor’s business for inspection, including a detailed review of the contractor’s operation equipment. The contractor is obliged to partake in such inspections, without compensation.

*Clause 3.* If the contractor completes the service agreement wholly or in part via subcontracting, he is obliged in his service agreements with the subcontractors to incorporate a clause entitling HUR to inspect the businesses of the subcontractors to the same extent as described in Clauses 1 and 2.

## **5. Financial statements and budgets**

*Clause 1.* During the contract period the contractor is obliged to submit financial statements to HUR on his own initiative. The financial statement must have a level of detail and an information value corresponding to what is required by the Danish Commerce and Companies Agency (“Erhvervs- og Selskabsstyrelsen”), as laid down by the Public Limited Companies Act (“aktieselskabsloven”). The preparation of the financial statements must be undertaken by a registered public accountant or by a chartered accountant. Financial statements, or key figures after agreement, must be submitted no later than 6 months after the end of the financial year.

*Clause 2.* Irrespective of how the contractor’s business is organised, HUR is, in connection with the contract negotiations, entitled to an insight into the budget for the first full year of operation. This budget must also show how new acquisitions, as well as how the current operations are financed.

*Clause 3.* The financial disclosures referred to in Clause 1 and 2 will be reviewed in confidence.

## **6. Damage and injury**

*Clause 1.* If, during the execution of their duties in accordance with the service agreement, the contractor or the latter’s subcontractors cause damage to persons or property, be it persons or property transported by the contractor, or damage to third party persons or property, the contractor or the latter’s subcontractors will be solely responsible for such damage.

*Clause 2.* If an injured party makes a claim against HUR for such damage

as referred to in Clause 1, the contractor must exempt HUR from any claims and expenses, including legal costs, interest etc., incurred by HUR in connection with such a claim.

## **7. Confidentiality**

*Clause 1.* The contractor and HUR are mutually obliged to treat information about their respective businesses and other conditions, which justifiably require discretion, with confidentiality. However, please cf. section 13, Right of access to information – Disclosure, of these Tender Terms and Conditions.

*Clause 2.* This confidentiality also applies after expiry or termination of the service agreement, irrespective of the reason.

## **8. Bankruptcy etc**

*Clause 1.* If the contractor declares himself bankrupt or suspends payments, or is declared bankrupt or goes into liquidation, HUR is entitled to terminate the service agreement with immediate effect. HUR must be notified immediately, in writing, of any suspension of payments or application for bankruptcy etc., pronouncement of bankruptcy order, appointment of executor or commencement of liquidation.

*Clause 2.* If the contractor is registered as a privately operated business, HUR is entitled to terminate the service agreement if the contractor dies, and his estate is administered as an estate wherein the heirs disclaim liability.

## **9. Replacement of drivers**

*Clause 1.* If serious or repeated complaints can be attributed to one of the contractor's drivers, and justifies his expulsion/discharge, HUR is entitled to demand that the driver in question is removed from the services under the

service agreement.

## 10. Damages

*Clause 1.* The contractor is liable for documented financial losses caused by his breach of the service agreement, unless such breach is caused by weather conditions which the contractor can not reasonably be expected to overcome, or by force majeure. If the contract is terminated in part, HUR can claim payment in accordance with the normal damages provisions of Danish Law. Payment of penalties does not entail a reduction of any damages claims.

*Clause 2.* Force majeure is defined as extraordinary events which prevent the performance of the service agreement, and which arise at no fault of the contractor, under circumstances which are beyond the latter's control and which he could not have foreseen.

## 11. Termination

*Clause 1.* In the event of a significant breach of the service agreement by the contractor, HUR is entitled to terminate the service agreement in its entirety.

*Clause 2.* Significant breach of contract encompasses i.a. the fact that the contractor, despite written notice, neglects crucial duties under the contract, e.g. if the contractor appoints a driver who is not trained in HUR's tariff system, nor instructed to a sufficient degree with respect to ticketing, customer service, the service itself, information material etc.

A breach of the service agreement can also be so serious, that HUR can terminate the contract without prior notice. For example:

- If the Road Traffic Council withdraws the contractor's license for the commercial passenger transportation.

- If the contractor declares himself or goes bankrupt, suspends payments etc., as described in Section 8 of this Annex.

*Clause 3.* Termination of the service agreement does not prohibit HUR to claim damages under Section 10 of this Annex.

## **12. Termination of part of the contract**

*Clause 1.* In the event of a significant breach of contract, HUR can choose to terminate the parts of the contract that are in breach.

*Clause 2.* In the event of a less severe breach of the service agreement, HUR is also entitled to terminate part of the contract.

*Clause 3.* Part termination of the service agreement is defined as a reduction of the contractor's services under the service agreement, by removing a route or by taking out a number of services on a route and reducing the number of buses, without otherwise satisfying the conditions for changes in the extent of services in the contract period, cf. Section 10 of the Tender Terms and Conditions.

*Clause 4.* In addition to the reduction in the number of bus hours, which results from the partial termination of the service agreement, these situations will also entail a proportionate reduction of fixed costs and bus-related costs.

*Clause 5.* On evaluation of whether the conditions for a part termination are satisfied, the nature of the breach, as well as the drawbacks incurred by the contractor through such reduction of services, must be considered.

*Clause 6.* HUR may choose to make the part termination of the service agreement temporary.

*Clause 7.* Termination of part of the service agreement will not prohibit HUR to claim damages under Section 10 of this Annex.

### 13. Setoffs against payments

*Clause 1.* If the breach of contract is not of such nature that it justifies a part or full termination, but failure to comply with the service agreement's individual clauses still inconveniences the customers or contributes to a reduction in service standards, then HUR is entitled to apply the sanctions mentioned below.

*Clause 2.* HUR will apply financial sanctions in connection with quality shortcomings ascertained by HUR's Traffic Service, partly on inspection of the buses and partly as otherwise registered or documented, including the assessment of data from the installed IT equipment.

With the following situations, HUR is entitled to make a setoff of DKK 3,000 per confirmed case:

- Premature departure from terminal/check point
- Missing fares
- Failure to replace defective ticketing equipment
- Failure to, or late report of service irregularities, cf. Section 9 of the Tender Conditions and Stipulations

With the following situations, HUR is entitled to make a setoff of DKK 1,500 per confirmed case:

- Operation of other bus type than agreed
- Delayed departure from terminal of more than 2 minutes
- Incorrect signage
- Wrong and unclear stamping of tickets/concession cards
- Relief of driver on the route taking more than 2 minutes
- No access to a bus during the terminal stopping time interval
- Incorrect operation of tally buses
- Unacceptable exterior and interior cleaning of the buses
- If the bus does not meet the contract's demands with respect to its appearance, standard of maintenance and functions

With the following situations, HUR is entitled to make a setoff of DKK 750 per confirmed case:

- Failure to put out HUR information material in the buses
- Failure to take down advertising/information material which is no longer current
- Failure to announce bus stops and new zones
- Missing light in signs
- Insufficient lighting in the bus
- Incorrect time and zone in the combination sign
- Non-presentable uniform

*Clause 3.* If the contractor repeatedly does not respect the set deadlines for reporting service irregularities, or if the contractor repeatedly fails to report service irregularities, HUR is entitled to make a setoff of DKK 6,000 per confirmed case.

*Clause 4.* Sanctions in connection with deleted services:

If a number of the services set out in the service agreement are not completed as planned, HUR will effect setoffs against payment.

HUR considers a service as deleted when, irrespective of the reason, there is talk of a delay where the duration is longer than the service frequency on the route and in all cases, irrespective of the reason, when the duration of the delay is longer than 20 minutes.

HUR effects setoffs against payment for deleted services according to the following rates:

- DKK 350 per bus hour on deleted service up to 0.05%
- DKK 700 per bus hour on deleted service from 0.05% up to 0.01%
- DKK 1,400 per bus hour on deleted service from 0.01% up to 0.15%



- DKK 2,100 per bus hour on deleted service from 0.15% up to 0.20%
- DKK 2,800 per bus hour on deleted service from 0.20% up to 0.25%
- DKK 3,500 per bus hour on deleted service from 0.25% and above.

*Clause 5.* With the following situations, HUR is entitled to make setoffs of DKK 500 per confirmed case:

- If the contractor fails to inform HUR about fundamental complaints or about information for the use of responses to complaints
- If the contractor does not comply with the Section 9 stated deadlines for customer inquiries.
- If HUR repeatedly receives complaints regarding the contractor's responses to customer inquiries as well as handling and administration of lost property etc.
- In case of delayed submission of service schedules, service reports or other agreed reports regarding service aspect (DKK 500 per day or per bus or other described service unit)
- If there are incomplete bus service reports or other agreed reports (DKK 500 per day per bus or other described service unit). Conversely, on late submission of payment schedules, HUR will reward compensation to the contractor, cf. Tender Terms and Conditions, Section 10.
- Failure or incorrect use of, or failure to report faults with the IT equipment in buses, including bus radios, bus computers, PTS, IT for A-buses and Travelcards and the contractor's work stations, about which the contractor has entered into a concrete agreement (DKK 500 per registered occurrence / trip respectively).

*Clause 6.* If the contractor fails to ensure the completion of the agreed or compensated service with tally buses (PTS), cf. Annex 5, HUR is entitled to effect the following setoffs:

- DKK 100 per trip per month for the agreed PTS-trips on weekdays (exc. Saturdays)
- DKK 100 per trip per quarter for the agreed PTS-trips at weekends

*Clause 7.* If the standard of cleaning of the premises and the toilet facilities is unsatisfactory according to the cleaning programmes laid out in Section 5 of the Tender Terms and Conditions, HUR is entitled to effect the following setoffs:

- DKK 2,000 per confirmed case of failure to complete cleaning programme 1
- DKK 1,500 per confirmed case of failure to complete cleaning programme 2
- DKK 1,000 per confirmed case of failure to complete cleaning programme 3

If the thorough (yearly) clean and the polishing of windows are not completed in accordance with the guidelines outlined in Section 5, HUR is entitled to effect setoffs against payments corresponding to 150% of the respective calculated savings obtained by the contractor.

*Clause 8.* HUR continually assesses the number of certified drivers. Failure to fulfil the certification demands after the first contract year will entitle HUR to effect yearly setoffs of DKK 5,000 per non-certified driver.

*Clause 9.* In addition to this, HUR can apply below mentioned sanctions:

- If, on acquisition of new buses, the contractor fails to acquire standardised additional environmental equipment, or, if such equipment or other environmental equipment e.g. a noise kit, is dismantled during the contract period, HUR is entitled to reduce the bus related costs by an amount corresponding to 150% of the respective calculated savings obtained by the contractor.
- If the contractor fails to use environmentally friendly fuel or fails to secure the agreed fuel reserves during times of crisis, HUR is entitled to reduce payments to the contractor by 150% of the contractor's respective calculated saving.

*Clause 10.* The above mentioned sanctions may be implemented even if HUR cannot render probable / document any financial losses. Any documented loss by HUR can be demanded compensated, as laid down by Section 10 of this Annex. The setoffs undertaken in accordance with the above mentioned clauses will not be deducted from such compensations. The fact that the contractor will have to tolerate the setoffs set out in the above mentioned clauses does not exempt him from immediately rectifying the complaints. If the contractor fails to rectify the situation, additional set-offs will be effected, just as other sanctions may also be enforced, as laid down by the service agreement.

*Clause 11* HUR is entitled to suspend any sanctions under special conditions, such as force majeure etc. However, suspension of sanctions for deleted services will never result in bus hour related payment for non-performed services.

#### **14. Re-negotiation**

*Clause 1.* If statutory interventions are introduced during the contract period which result in significant financial changes to the conditions on which the contract is based, both parties are entitled to demand re-negotiations for the adjustment of prices.

*Clause 2.* If the contractor and HUR cannot reach agreement on whether or not conditions justify an adjustment of prices, or if the contractor and HUR cannot reach agreement on the level of price adjustment, either party may refer the question to arbitration, cf. Section 15, clause 5 of this Annex.

#### **15. Arbitration – choice of law**

*Clause 1.* Disagreement between the parties as to the interpretation of the service agreement or conditions otherwise laid down by the service agreement, will be settled by arbitration according to Danish law. The court of arbitration's ruling is final and binding for both parties.

*Clause 2.* The court of arbitration consists of 3 members. On request by either party, the President of the Danish Supreme Court will appoint the umpire. Each party must appoint one arbitrator.

*Clause 3.* The arbitrators must be appointed and the umpire notified hereof no later than 14 days following appointment. If such appointment is not notified, the umpire will appoint the arbitrator(s).

*Clause 4.* The court of arbitration will lay down the procedures for the individual case. Costs in connection with the arbitration, including court of arbitration fees, are paid by the parties as determined by the court of arbitration. The court of arbitration may also assign costs to one of the parties.

*Clause 5.* In the situations referred to in Section 14, clause 2, the court of arbitration will constitute 5 members, the Danish Maritime and Commercial Court (“Sø- og Handelsretten”) appointing 3 members, one of whom shall satisfy the conditions for acting as judge, and each of the parties appointing 1 arbitrator.

The member of the court of arbitration satisfying the conditions for acting as judge, shall be the umpire of the court of arbitration. Otherwise, the stipulations of clauses 1-4 will apply.

*Clause 6.* The court of arbitration, appointed under clause 5, is entitled to determine which prices shall apply, possibly with retroactive effect, and to otherwise amend the service agreement to the extent that the court of arbitration considers reasonable under the existing circumstances. In this connection, the court of arbitration is not bound by the parties’ claims and allegations.

*Clause 7.* If a third party brings legal action against HUR for circumstances, which are wholly or partly attributable to the contractor’s performance under the service agreement, HUR can – notwithstanding the above provisions in respect of arbitration – choose to involve the contractor in such proceedings.

**16. Guarantee**

*Clause 1.* The guarantee must be prepared as shown on the following page.

# Guarantee

## (example)

At the request of (contractor's name and address), and as the latter's underwriter, we hereby guarantee towards Hovedstadens Udviklingsråd, Trafikdivisionen – referred to as HUR in the following – Gammel Køge Landevej 3, 2500 Valby the payment of up to a total of DKK....., written as DKK..... as security for the fulfillment of all the contractor's obligations, as laid down by the contract of (date), including any later revisions/additions.

The guarantee is not affected by HUR granting the contractor respite with regard to the fulfillment of the latter's obligations.

The guarantee is held until released by HUR, which will happen no later than 3 months after the termination of contract, unless prior claims have been made against the guarantee.

At HUR's request, the guarantee can be released to HUR, without HUR having documented its right for such by out-of-court settlement, court decision or arbitral award.

Payment on the guarantee will be made to HUR on demand, no later than 5 working days after the receipt of written demand.

Disputes between the underwriter and HUR with relation to the present guarantee will be settled finally, and with binding effect, by the court of arbitration which settles disputes between HUR and the contractor, as laid down by the contract of (date).

Danish law applies to the legal matters between the underwriter and HUR.

This guarantee must be returned to (Bank/bonding Company) at its discontinuation.

Location:

Date:

Underwriter: